

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MONTANA DEPARTMENT OF  
REVENUE,

Petitioner-Appellee,

vs.

TIMOTHY L. BLIXSETH

Respondent-Appellant.

Case No.:2:13-cv-01324-JAD

Bankruptcy Appeal From Dismissal of  
Involuntary Chapter 7 (Bankr. Case #  
11-15010-BAM)

**Order Granting Request for  
Certification of Direct Appeal to  
United States Court of Appeals for the  
Ninth Circuit Pursuant to 28 U.S.C. §  
158(d)(2)  
[Doc. 21]**

The Montana Department of Revenue (“MDOR”) and Timothy L. Blixseth have appealed an Order of the Bankruptcy Court, Bankr. Doc. 528, dismissing that involuntary bankruptcy case. On September 9, 2013, MDOR filed a request pursuant to 28 U.S.C. § 158(d)(2) that this Court certify the appeals of MDOR and Mr. Blixseth directly to the United States Court of Appeals for the Ninth Circuit. Doc. 21. Having reviewed the points and authorities submitted by MDOR’s counsel, and seeing no opposition thereto, and good cause appearing, the Court hereby **GRANTS** MDOR’s request [Doc. 21] on the bases of the findings that follow.

**A. The Appeal Involves a Question of Law as to Which There Is No Controlling Ninth Circuit or United States Supreme Court Decision.**

The Court finds within the meaning of 28 U.S.C. § 158(d)(2)(A)(i) that the Bankruptcy Court's order dismissing the involuntary case below involves a question of law as to which there is no controlling decision of the United States Court of Appeals for the Ninth Circuit or of the Supreme Court of the United States. That question of law is whether the bankruptcy court erred in concluding that, when a creditor has claims of disputed and undisputed amounts, any bona fide dispute—whether it brings the creditor's claim under the threshold or not—disqualifies the creditor's claim in total for purposes of 11 U.S.C. § 303(b). Doc. 21 at 2-3, 6. The Court finds that this is a matter of public importance because it appears that no Circuit Court has spoken to the meaning and effect of § 303(b) since its amendment in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 1234(a)(1)(A) & (a)(12), 119 Stat. 23 (April 20, 2005) ("BAPCPA"). As a result, there is no controlling decision on this issue and, as discussed below, there is a significant split of authority among the bankruptcy courts.

The impact of the recent decision in *Marciano v. Chapnick (In re Marciano)*, 708 F.3d 1123 (9th Cir. 2013), on this case is another question of law yet unresolved by Ninth Circuit or United States Supreme Court authority. In *Marciano*, the Ninth Circuit held that an unstayed non-default state judgment is not subject to bona fide dispute for purposes of § 303(b)(1). *Id.* at 1128-29. MDOR contends that the claims at issue in this appeal involve "sworn, uncontested tax returns, non-appealed final judgment, and admissions before state tax tribunals." Doc. 21 at 3. The question of whether *Marciano* applies to the claims at issue in this appeal has not yet been answered and, beyond its importance to the parties to this appeal, it is also a matter of importance to taxing authorities and taxpayers in this circuit alike.

1 Therefore, the Court finds that a decision from the Ninth Circuit on these issues of  
2 law will provide guidance to petitioning creditors, involuntary debtors, and bankruptcy  
3 courts by which to analyze the creditor's qualifications under 11 U.S.C. § 303(b).

4 **B. The Appeal Involves a Question of Law Requiring Resolution of Conflicting**  
5 **Decisions.**

6 The Court also finds within the meaning of 28 U.S.C. § 158(d)(2)(A)(ii) that the  
7 Bankruptcy Court's order dismissing the involuntary case below involves a question of  
8 law requiring resolution of conflicting decisions from bankruptcy courts in numerous  
9 jurisdictions. Mr. Blixseth and the Bankruptcy Court relied on a significant body of  
10 caselaw interpreting BAPCPA's amendment to 11 U.S.C § 303(b) to provide that any  
11 bona fide dispute as to amount, whether it brings the creditor's claim under the  
12 undisputed claim threshold amount or not, disqualifies the creditor's claim in total. *See*  
13 *Bankr. Case 11-15010-wtt*, Doc. 528 at 11-13 (Bankruptcy Court Order Dismissing the  
14 *Involuntary Case*; and *Same*, Doc. 515 at 28 (Blixseth's Post-Trial Closing Brief in  
15 *Support of Amended Motion to Dismiss Involuntary Case*) (both citing to *In re*  
16 *Excavation, Etc., LLC*, 2009 WL 1871682 at \*1-2 (Bankr. D. Or. 2009) (unpublished); *In*  
17 *re Elverson*, 2013 WL 2138875 at \*8 (Bankr. E.D. Pa. 2013); *In re Skyworks Ventures,*  
18 *Inc.*, 431 B.R. 573, 578 n.1 (Bankr. D.N.J. 2010); *In re Rosenberg*, 414 B.R. 826, 846  
19 (Bankr. S.D. Fla. 2009); *In re Euro-American Lodging Corp.*, 357 B.R. 700, 712 n. 8  
20 (Bankr. S.D.N.Y. 2007); *In re Regional Anesthesia Associates PC*, 360 B.R. 466, 470  
21 (Bankr. W.D. Pa. 2007); *In re Mountain Dairies, Inc.*, 372 B.R. 623, 634 (Bankr.  
22 S.D.N.Y. 2007). MDOR, however, urged an alternative line of cases that rejects this  
23 disqualifying approach, which MDOR characterizes as indicative of the "unambiguous  
24 trend nationwide over the past several years." Doc. 21 at 6-8 (citing *In re DemirCo*  
25 *Holdings, Inc.*, 2006 WL 1663237 at \*3 (Bankr. C.D. Ill. 2006) (unpublished); *In re*  
26 *Miller*, 489 B.R. 74, 81-82 (Bankr. E.D. Tenn. 2013) ("the court does not agree that  
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1 post-BAPCPA §303(b) requires an all-or-nothing analysis: that the statutory language “as  
2 to liability or amount’ should be read as meaning that any dispute as to any portion of the  
3 amount of a claim owed disqualifies a creditor from being a petitioning creditor”); *In re*  
4 *Tucker*, 2010 WL 4823917 at \*6 (Bankr. N.D. W.Va. 2010) (slip copy) (“[t]he better  
5 reasoned authority suggests that a petitioning creditor is not disqualified even if a bona  
6 fide dispute exists regarding a portion of its claim”); *In re Wishgard*, LLC, 2013 WL  
7 1774707 at \*5 (Bankr. W.D. Pa. 2013) (slip copy) (“this Court finds the analysis in *Miller*  
8 to be the persuasive interpretation”); *In re Roselli*, 2013 WL 828304 at \*9 (Bankr. W.D.  
9 N.C. 2013) (slip copy); *In re Mountain Country Partners*, LLC, 2012 WL 2394714 at \*3  
10 (Bankr. S.D. W.V. 2012) (slip copy). This split in authority qualifies this matter for  
11 certification under 28 U.S.C. § 158(d)(2)(A)(iii).

12 **C. Direct Appeal May Materially Advance the Progress of this Case.**

13 The Court also finds within the meaning of 28 U.S.C. § 158(d)(2)(A)(iii) that a  
14 direct appeal from the Bankruptcy Court’s order may materially advance the progress of  
15 the case. This case has already had a prior order appealed to the BAP and Ninth Circuit.  
16 In 2011, the Bankruptcy Court dismissed this case on venue grounds; MDOR appealed to  
17 the Ninth Circuit BAP, which issued an order on December 17, 2012, reversing and  
18 remanding the case. *See* BAP Case #11-1305. Mr. Blixseth then appealed the BAP  
19 decision to the Ninth Circuit, later withdrawing the appeal. *See* 9th Cir. Case No.  
20 13-60007. The instant matter involves both appeal and cross-appeal issues, and it is  
21 probable that this case will find its way to the Ninth Circuit Court of Appeals regardless  
22 of the outcome of the proceedings before this Court. For that reason and the importance  
23 of the questions of law described above, the Court finds that certification for direct appeal  
24 may materially—and more expeditiously—advance the progress of this case.

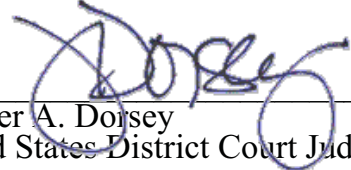
25 Accordingly, in the interest of judicial and economic efficiency, pursuant to 28  
26 U.S.C. § 158(d)(2), IT IS HEREBY ORDERED that The Montana Department of  
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1 Revenue's Request for Certification Pursuant to 28 U.S.C. §158(d)(2) [#21] is  
2 **GRANTED.**

3 THIS COURT HEREBY **CERTIFIES this appeal directly to the United States**  
4 **Court of Appeals for the Ninth Circuit** pursuant to 28 U.S.C. §158(d)(2)(B).

5 The Clerk of this Court is hereby directed to file this certification in this Court's  
6 docket.

7 Dated this 25th day of September, 2013.

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Jennifer A. Dorsey  
United States District Court Judge